

1 UNITED STATES COURT OF APPEALS

2
3 FOR THE SECOND CIRCUIT

4
5 August Term, 2005

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7
8 (Submitted: May 23, 2006 Decided: June 23, 2006)

9
10 Docket Nos. 06-1380-op, 06-1392-op

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13
14 YASSIN MUHIDDIN AREF,

15
16 Defendant-Petitioner,

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18 - v.-

19
20 UNITED STATES OF AMERICA,

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22 Plaintiff-Respondent,

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24 NEW YORK CIVIL LIBERTIES UNION,

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26 Movant.

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31 Before: JACOBS, and B.D. PARKER, Circuit Judges,
32 and PRESKA, District Judge.*

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34 Yassin Muhiddin Aref, facing criminal charges in the
35 United States District Court for the Northern District of New
36 York, moves for a writ of mandamus ordering the district
37 court to vacate orders that are based on confidential

*The Honorable Loretta A. Preska, United States District Judge for the Southern District of New York, sitting by designation.

1 documents, arguments, and decision memoranda, and ordering
2 the United States to disclose certain information to Aref and
3 to abandon a communications monitoring program described in
4 newspaper articles. In separate petitions, the New York
5 Civil Liberties Union ("NYCLU") (1) moves to intervene in
6 Aref's motion and (2) independently petitions for a writ of
7 mandamus ordering substantially the same relief as that
8 requested by Aref. We dismiss Aref's petition in part, and
9 in remaining part we deny it; we dismiss NYCLU's petition for
10 lack of jurisdiction and deny the organization's motion to
11 intervene as moot.

12 TERENCE L. KINDLON, Kindlon and
13 Shanks, P.C., Albany, NY for
14 Defendant-Petitioner (on
15 submission).

16
17 WILLIAM C. PERICEK, Assistant
18 United States Attorney (Glenn T.
19 Suddaby, United States Attorney
20 for the Northern District of New
21 York, of counsel), for
22 Respondent.

23
24 ARTHUR EISENBERG, (Christopher
25 Dunn), New York Civil Liberties
26 Union, for Movant.

27 PER CURIAM:

28 Yassin Muhiddin Aref, facing criminal charges in the
29 United States District Court for the Northern District of New
30 York (McAvoy, J.), moves for a writ of mandamus [i] ordering

1 the district court to vacate orders that are based on
2 confidential documents, arguments, and decision memoranda,
3 and [ii] ordering the United States to disclose certain
4 information to Aref about a communications monitoring program
5 described in newspaper articles, and to abandon it. In a set
6 of motions consolidated with those made by Aref, the New York
7 Civil Liberties Union ("NYCLU") [i] moves to intervene in
8 Aref's motion and [ii] independently petitions for a writ of
9 mandamus ordering substantially the same relief as that
10 requested by Aref. We dismiss Aref's petition in part, and
11 in remaining part we deny it; we dismiss NYCLU's petition for
12 lack of jurisdiction and deny the organization's motion to
13 intervene as moot.

14 I

15 Aref was arrested in August 2004 on charges of money
16 laundering. The government alleges that, in a government
17 sting operation, Aref and a co-defendant--Mohammed Hossain--
18 agreed to launder \$50,000 cash proceeds of a sale of weapons
19 to terrorists. The government agents told Aref and Hossain
20 that the cash was generated by the sale of a surface-to-air
21 missile to a jihadist who had imminent plans to use it on
22 targets in Manhattan.

23 A. *Issuance of Protective Orders*

1 Pursuant to the Classified Information Procedures Act
2 ("CIPA"), the government moved for a protective order to
3 maintain the confidentiality of certain prosecutorial
4 evidence. See 18 U.S.C. App. § 3 ("Upon motion of the United
5 States, the court shall issue an order to protect against the
6 disclosure of any classified information disclosed by the
7 United States to any defendant in any criminal case in a
8 district court of the United States."). In support of the
9 motion, the prosecution submitted documents under seal; they
10 remain confidential.

11 On November 16, 2004, the district court granted a
12 modified protective order that allowed redacted versions of
13 certain confidential prosecutorial exhibits to be viewed, but
14 only by defense personnel (1) who obtain proper security
15 clearance and (2) who sign an agreement to obey the
16 protective order. The government filed several exhibits
17 under the terms of the protective order, but the evidence
18 filed in support of the protective order motion remained
19 confidential and under seal.

20 Taking a new tack, Aref moved to suppress the
21 prosecution's confidential evidence. This motion was denied
22 on January 9, 2006. Aref moved for reconsideration, citing a
23 news article and seeking (1) suppression of the government's

1 confidential evidence as "the poisonous fruit of blatantly
2 illegal electronic surveillance;" (2) the dismissal of the
3 indictment; and (3) an order directing the United States
4 government (pursuant to 18 U.S.C. § 3504(a)(1)) to affirm or
5 deny that evidence against Aref was obtained through an
6 electronic surveillance program described in newspaper
7 reports. The government responded under seal. The motion
8 for reconsideration was denied in a public order accompanied
9 by a corresponding order filed under seal.

10 Various other motions for protective orders were filed
11 and granted, with public orders accompanied by classified
12 explanatory orders. Although the government has publicly
13 disclosed redacted versions of certain confidential
14 documents, Aref is unsatisfied and seeks (inter alia) access
15 to confidential information about government monitoring of
16 communications. Aref Petition at 14.

17 Aref petitions this Court for a writ of mandamus that
18 would (1) order the district court to vacate its classified
19 orders and those orders premised on classified government
20 filings, (2) grant access to unredacted versions of the
21 government's confidential exhibits, (3) order the United
22 States government to affirm or deny the existence of "NSA
23 warrantless surveillance material in this case, and provide

1 said material to the defense,” (4) “[r]ule that the
2 warrantless NSA surveillance program is illegal,” and (5)
3 suppress “all evidence in the case as the poisonous fruit of
4 the illegal warrantless surveillance, and dismiss the
5 indictment.” Id. at 18.

6 *B. NYCLU*

7 NYCLU moves to intervene in Aref’s petition and
8 independently petitions this Court for a writ of mandamus,
9 challenging the same decisions of the district court but
10 asking for different relief: Where Aref seeks vacatur, NYCLU
11 seeks public access to all classified district court orders,
12 as well as to government filings in support of those orders.
13 NYCLU does not seek mandamus against the United States
14 government.

15 In the district court, NYCLU sought leave to file an
16 amicus curiae brief in support of Aref’s motion for
17 reconsideration. That request was denied as moot. NYCLU has
18 not moved to intervene in Aref’s district court proceedings.

19 **II.**

20 Aref’s petition is governed by two rules: one
21 applicable insofar as the United States government is
22 targeted directly and another applicable insofar as the

1 target is the district court.

2 A. *Request for Orders Issued to the Government*

3 Aref petitions this Court to issue a writ against the
4 United States government; however, this Court has no power to
5 entertain such petitions in the first instance. Our
6 jurisdiction to entertain a petition for mandamus is rooted
7 in the All Writs Act, Silverman v. NLRB, 543 F.2d 428, 430
8 (2d Cir. 1976), which provides that "all courts established
9 by Act of Congress may issue all writs necessary or
10 appropriate in aid of their respective jurisdictions and
11 agreeable to the usages and principles of law." 28 U.S.C. §
12 1651(a) (emphasis added). This grant of jurisdiction is
13 construed narrowly. See Netherlands Shipmortgage Corp. v.
14 Madias, 717 F.2d 731, 733 (2d Cir. 1983); see also United
15 States v. Victoria-21, 3 F.3d 571, 575 (2d Cir. 1993)
16 (describing "Congress' unquestionable intent to limit
17 appellate jurisdiction over interlocutory orders").

18 Accordingly, this Court may not issue writs except those
19 which aid our jurisdiction--which is appellate in nature.

20 Original jurisdiction lies in the district court (if
21 anywhere) for the issuance of this type of writ. See 28
22 U.S.C. § 1361 ("The district courts shall have original

1 jurisdiction of any action in the nature of mandamus to
2 compel an officer or employee of the United States or any
3 agency thereof to perform a duty owed to the plaintiff.”
4 (emphasis added)). By contrast, our usual jurisdiction over
5 federal criminal cases is limited to appeals; our mandamus
6 jurisdiction accordingly is limited to reviewing decisions of
7 the district courts. See 28 U.S.C. §§ 1291, 1292 (limiting
8 jurisdiction to appeals from final judgments and certain
9 orders of the district). It is telling that at one time, the
10 appellate rules cast the district court as respondent to a
11 petition for a writ of mandamus, and that the relevant rule
12 was amended only “to change the tone of the rule and of
13 mandamus proceedings generally.” See Notes of Adv. Comm. on
14 1996 Amendments to Rule 21.

15 Those aspects of Aref’s petition that ask this Court to
16 issue orders directly to the United States government are
17 dismissed for lack of jurisdiction.

18 *B. Request for Orders Issued to the District Court*

19 The remainder of Aref’s petition, which seeks relief
20 against the district court, is without merit.

21 Mandamus is an extraordinary remedy, available only in
22 extraordinary circumstances, see In re United States, 10 F.3d

1 931, 933 (2d Cir. 1993), and will be granted only if
2 petitioner shows "(1) the presence of a novel and significant
3 question of law; (2) the inadequacy of other available
4 remedies; and (3) the presence of a legal issue whose
5 resolution will aid in the administration of justice." Id.
6 (internal citations omitted). We "have expressed reluctance"
7 to use mandamus as a means of challenging discovery orders of
8 the district court. United States v. Coppa, 267 F.3d 132,
9 137 (2d Cir. 2001) (internal citations omitted).

10 Putting aside the significance of any question posed by
11 Aref's petition, Aref has wholly failed to establish that
12 other remedies are inadequate. If relief may be obtained by
13 direct appeal, mandamus is inappropriate. In re Austrian &
14 German Holocaust Litig., 250 F.3d 156, 162 (2d Cir. 2001).
15 "An order that is beyond the scope of the district court's
16 authority is of course normally remediable through a direct
17 appeal." Id.

18 Aref will be able to challenge the complained-of orders
19 on direct appeal. He claims he will suffer "irreparable
20 harm" because of violations to his "substantive and
21 procedural rights to due process, including his Sixth
22 Amendment rights to confrontation and the effective

1 assistance of counsel." Petitioner's Br. at 25. However,
2 this Court routinely hears by direct appeal claims arguing
3 the deprivation of the right to confront witnesses or the
4 right to effective assistance of counsel.¹

5 Insofar as Aref's petition has not been dismissed, it is
6 denied for failure to demonstrate "the inadequacy of other
7 available remedies."

8 III

9 Since nothing is left of Aref's petition for a writ of
10 mandamus, NYCLU's motion to intervene in that petition is
11 denied as moot. NYCLU's independent petition for mandamus is
12 dismissed for lack of jurisdiction. NYCLU is not a party in
13 this case, nor is it appealing from a denial of leave to
14 intervene in Aref's prosecution. NYCLU moved to submit an
15 amicus brief to the district court, but the denial of that
16 motion is not in issue. Accordingly, NYCLU may not petition
17 this court for relief in a case in which the organization

¹ See, e.g., United States v. Goldstein, 442 F.3d 777 (2d Cir. 2006) (claiming, inter alia, violation of Sixth Amendment right to confrontation); United States v. Snype, 441 F.3d 119, 125 (2d Cir. 2006) (same); United States v. Cohen, 427 F.3d 164, 168 (2d Cir. 2005) (claiming, inter alia, deprivation of effective assistance of counsel); United States v. Wellington, 417 F.3d 284, 287 (2d Cir. 2005) (same).

1 lacks involvement.

2 The Federal Rules contemplate that petitions for
3 mandamus will be filed by "parties." Fed. R. App. P. 21; see
4 also Notes of Adv. Comm. on 1996 Amendments to Rule 21 ("Most
5 often a petition for a writ of mandamus seeks review of the
6 intrinsic merits of a judge's action and is in reality an
7 adversary proceeding between the parties."). We are aware of
8 no authority authorizing a non-party to petition the Court of
9 Appeals for a writ of mandamus in a criminal case. If NYCLU
10 wanted to petition this Court for mandamus: (1) it might
11 have sought intervention in the district court or (2) it
12 might have filed its own civil claim seeking public
13 disclosure of judicial documents generated in Aref's case.
14 See ABC, Inc. v. Stewart, 360 F.3d 90, 97 (2d Cir. 2004)
15 (expressing indifference between appellate status of an
16 independent civil case and an intervention in the pending
17 criminal case).

18 NYCLU claims to represent the public interest in the
19 disclosure of judicial documents. (Of course, the elected
20 government of the United States has a claim to represent the
21 public interest in preserving non-disclosure.) Though the
22 public may have such an interest, see Lugosch v. Pyramid Co.

1 of Onondaga, 435 F.3d 110, 119 (2d Cir. 2006), the cases that
2 NYCLU cites in support of its independent, uninvited petition
3 all involve appeals from (1) district court denials of (2)
4 motions made by intervenors (3) for the sake of advancing the
5 public's interest in access to judicial documents, or appeals
6 from separate civil suits seeking to compel disclosure. Id.;
7 ABC, Inc., 360 F.3d at 97; In re New York Times Co., 828 F.2d
8 110, 113 (2d Cir. 1987); In re Washington Post Co., 807 F.2d
9 383, 387 (4th Cir. 1986); United States v. Criden, 675 F.2d
10 550, 552 (3d Cir. 1982); see also Detroit Free Press v.
11 Ashcroft, 303 F.3d 681 (6th Cir. 2002); United States v.
12 Brooklier, 685 F.2d 1162, 1165 (9th Cir. 1982). Absent a
13 prior attempt at intervention at the district court level or
14 a request for public disclosure in an independent district
15 court civil suit, NYCLU cannot seek redress here.
16 Accordingly, the petition is dismissed for lack of
17 jurisdiction.

18
19 We have considered the parties' remaining arguments and
20 find each of them to be without merit. For the foregoing
21 reasons, Aref's petition is in part dismissed for lack of
22 jurisdiction and denied in remaining part. NYCLU's motion to

1 intervene is denied as moot and its petition is dismissed for
2 want of jurisdiction.